IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES PAVATT,	)	
	)	
Plaintiff	)	
	)	
JEFFREY D. MATTHEWS,	)	
	)	
Intervenor Plaintiff,	)	
	)	
JOHN D. DUTY	)	
	)	
Plaintiff-Intervenor	)	
v.	)	**Case No. CIV-10-141-F**
	)	
JUSTIN JONES, in his capacity as Director of the Oklahoma Department of Corrections, et al.,	)	
	)	
Defendants,	)	

PLAINTIFF INTERVENORS JEFFREY MATTHEWS' AND JOHN DUTY'S TRIAL BRIEF

Intervenor Plaintiffs Jeffrey D. Matthews and John D. Duty, jointly and through counsel, submit this brief on the issues presented for disposition through their respective motions for preliminary injunction relief. Docs. 66, 86. This brief is being submitted pursuant to this Court's September 29, 2010 scheduling order (Doc.69) and endeavors to adhere to the specific chamber rules of this Court. Mr. Matthews' action has proceeded on an accelerated schedule due to the State's judicially recognized interest in carrying out its judgments expeditiously. Mr. Duty's action has proceeded on an even more accelerated pace as his intervention came after Mr. Matthews' intervention and he has an impending execution scheduled for December 16, 2010.

I. FACTS

Intervenor Plaintiff Jeffrey D. Matthews is subject to a sentence of death pursuant to a final judgment from Oklahoma state court. He is currently under a stay of execution order entered by this Court on September 29, 2010. Doc. 66. Mr. Matthews' stay of execution is in place until November 20, 2010, the day following the scheduled hearing. Doc. 69.

Intervenor Plaintiff John D. Duty is also subject to a sentence of death pursuant to a final judgment from Oklahoma state court. Mr. Duty is facing an execution date of December 16, 2010. He has filed with this Court a request for stay of execution (Doc. 77) which remains pending contingent upon the outcome of the November 19, 2010 hearing.

Defendants' Drug Switching

Mr. Matthews' execution had been scheduled for August 17, 2010. As of that date, and for many years prior thereto, the lethal injection protocol used by the Department of Corrections ("DOC") called for the use of sodium thiopental as the statutorily-required ultra short acting barbiturate. However, on August 16, 2010, counsel for DOC notified James Pavatt's counsel, Assistant Federal Public Defender Patti Ghezzi-Palmer, that DOC intended to use Brevital instead of sodium thiopental in Mr. Matthews' execution. Brevital, though meeting the statutory requirement of being an "ultra short-acting" barbiturate, had never been used before in an execution either in Oklahoma or any other state. Ms. Ghezzi-Palmer was not asked to share this information with Mr. Matthews' counsel, nor was she told Mr. Matthews was scheduled to be executed the next day. Counsel for Mr. Matthews fortunately learned of DOC's plans from Ms. Ghezzi-Palmer and swiftly filed a motion to intervene in the instant action and a motion for stay of execution. A hearing was held the next morning. Following the hearing, this Court stayed Mr. Matthews' execution until October 16, 2010, and scheduled a hearing for October 15, 2010 on Mr. Matthews' motion for preliminary injunction.

On September 1, 2010, the DOC filed a motion to lift Mr. Matthews' stay of execution. In that motion, the DOC represented they had recently obtained some sodium thiopental and that it, not Brevital, would be used in Mr. Matthews' execution.

At a hearing held September 7, 2010, counsel for DOC reiterated that sodium thiopental was to be used in the execution of Mr. Matthews. DOC counsel also declared, however, that the drug to be used to execute the next offender with an execution date, Mr. Donald Wackerly, would be pentobarbital, not Brevital. Pentobarbital, like Brevital, has never before been used in an execution in the United States. Moreover, pentobarbital is not an "ultra short acting" barbiturate.

On September 8, 2010, DOC Director Justin Jones testified by deposition that the available dose of sodium thiopental would be used in the next-scheduled execution, presumably the execution of Don Wackerly scheduled to occur on October 14, 2010. This pronouncement created uncertainty as to the compound to be used as the first chemical agent in the execution of Mr. Matthews. At a conference held September 23, 2010, counsel for DOC announced the chemical agent to be used in the lethal injection of Mr. Matthews had in fact changed again, and would now be pentobarbital.

As this Court aptly stated in its September 29, 2010 Order, the net effect of the convoluted sequence of events was that, in less than six weeks, the compound designated to be used as the first agent administered in the execution of Mr. Matthews by lethal injection had gone from sodium thiopental to Brevital, then back to sodium thiopental, then perhaps, by implication, back to Brevital (or to a compound to be identified), then to pentobarbital. As a consequence this Court rescheduled Mr. Matthews' hearing for November 19, 2010 and accordingly set forth a new scheduling order. This Court also extended Mr. Matthews' stay of execution until November 20, 2010.

Mr. Wackerly was executed on October 15, 2010 by lethal injection utilizing the last dose of sodium thiopental in DOC's possession. Although Mr. Matthews' litigation concerning the switch to pentobarbital was pending, DOC next moved the State Court of Criminal Appeals to set an execution date for Mr. Duty. The State Court has scheduled Mr. Duty's execution for December 16, 2010. Counsel for DOC continues to state that DOC is searching for sodium thiopental to use as the anesthetic in upcoming executions.

At this juncture, however, it appears DOC will be using pentobarbital as the first of three drugs to be administered in the potential executions of Mr. Duty and Mr. Matthews.

II. SUMMARY OF LEGAL BASIS

The legal basis for the Intervenor Plaintiffs' instant action is 42 U.S.C. section 1983, which authorizes civil rights actions for deprivation of federal constitutional rights caused by persons acting under color of state law. Intervenor Plaintiffs' are presently before this Court on motions for preliminary injunctive relief. Counsel believes the parties are in substantial agreement regarding the legal standard applicable to Intervenor Plaintiffs' request for injunctive relief to preserve the status quo until a full trial on the merits of their Complaints can be conducted.

III. ANTICIPATED EVIDENTIARY OR UNUSUAL ISSUES

It appears there may be evidentiary issues to be addressed by the Court. Plaintiff Intervenors desire to present evidence concerning problematic executions in Oklahoma occurring since August of 2006. The relevance of this evidence is that it demonstrates that even with the use of sodium thiopental, a drug with a long history of being used for clinical induction of anesthesia and for induction of anesthesia for lethal injection, the risks of executions going awry are significant. These risks are then exacerbated by the switch to a new drug that has no such history.

Plaintiff Intervenors recognize from this Court's previous rulings that the Court believes any evidence from witnesses at previous executions is irrelevant. For that reason, Plaintiff Intervenors Plaintiff Intervenors intend to proffer testimony, hopefully by way of affidavit, to the Court for purposes of making a record.

IV. ARGUMENT AND AUTHORITIES

A. Pentobarbital Is Unsafe as Part of 3-Drug Protocol

Oklahoma's planned use of pentobarbital violates Plaintiff Intervenors' Eighth Amendment rights to be free from cruel and unusual punishment if it presents "a substantial risk of serious harm," or an "objectively intolerable risk of harm." *Baze v. Rees*, 553 U.S. 35, 50 (2008). State efforts to implement capital punishment must certainly comply with the Eighth Amendment, but what that Amendment prohibits is wanton exposure to "objectively intolerable risk." *Id.*, 553 U.S. at 61-62, *quoting Farmer v. Brennan*, 511 U.S. 825, at 846 (1994). To rise to the level of a constitutional violation the claimant must show that the risk is "substantial when compared to the known and available alternatives." *Id.*, 553 U.S. at 61.

Replacing sodium thiopental with pentobarbital as the anesthetic drug to be followed by vecuronium bromide and potassium chloride in a 3-drug lethal injection protocol creates an objectively intolerable risk of harm that is substantial when compared to the known available alternatives. The use of sodium thiopental for purposes of inducing anesthesia has a large body of support and recognition by way of research, clinical data, and peer-reviewed articles. The use of pentobarbital has no such body of support. The use of pentobarbital as an agent to induce anesthesia has no clinical history and is non-standard. It is not FDA-approved for use to induce anesthesia. The FDA package insert states that pentobarbital may be used in the parenteral form for sedatives, hypnotics for short-term treatment of insomnia, preanesthetics (essentially sedatives) and anticonvulsants.

There is essentially no available clinical data, research studies, or peer-reviewed articles regarding the use and effects of intravenous injection of pentobarbital to induce a surgical plane of anesthesia in a healthy, intact brain. There is no recognized dosage or time of onset for use of pentobarbital to induce a surgical plane of anesthesia in a healthy, intact brain. Indeed, the FDA package insert declares "There is no average intravenous dose of NEMBUTAL Sodium Solution (pentobarbital sodium injection) that can be relied on to produce similar effects in different patients."

Experience has shown that even with sodium thiopental and its long, well-recognized history of use for the purposes intended in an execution, there have been numerous problems in executions across the country. Use of pentobarbital, with its lack of clinical data and documented history to support its use for adequately anesthetizing an offender being executed with other painful drugs, increases the risk of harm presented to the subject being executed. It is of critical importance that the offender be in an adequate depth of anesthesia prior to administration of the second and third, potentially extremely painful, drugs. Using a drug for which there is no recognized dosage or time frame for adequate onset of anesthesia significantly heightens this risk.

The risk created is substantial, particularly when compared to known alternatives. Here, one known alternative is to remove vecuronium bromide and potassium chloride from Oklahoma's execution protocol and change to administration of a single barbiturate drug. This would eliminate the substantial risk presented by using pentobarbital in conjunction with these two painful drugs. And experience tells us it is unnecessary to administer vecuronium bromide and potassium chloride for purposes of an execution. This is borne out by the standards promulgated by the American Veterinary's Medical Association ("AVMA"). While the AVMA accepts pentobarbital for use in the euthanasia of small animals, the Guidelines explicitly state that it is unacceptable to use pentobarbital with a neuromuscular blocker. Furthermore, two states, Ohio and Washington, have now gone to single-drug barbiturate protocols using only sodium thiopental for the lethal injection. Their experience informs that use of the two additional painful drugs is wholly unnecessary.

The use of a drug, pentobarbital, for which there is no recognized dosage or time frame for adequate onset of anesthesia requires greater vigilance and greater skill on the part of the individual monitoring the depth of anesthesia. Both parties' experts appear to be in agreement that the individual doing the monitoring have a medical background, and be educated, trained and experienced in assessing the depth of anesthesia (with that task being part of his or her regular practice). It has thus become more critical for Plaintiff Intervenors to be ensured that, in executions in Oklahoma, the depth of anesthesia is indeed being accurately determined. In this regard, Plaintiff Intervenors have been prevented, *via* denial of discovery, from ascertaining the credentials, knowledge, and skill level of the physician attendant at Oklahoma executions.

A movant is entitled to a preliminary injunction if he can establish the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest. *Kikumura v. Hurley*, 242 F.3d 950, 955 (10 Cir. 2001).

With regard to the relative weight accorded each factor, the Tenth Circuit has held that because the showing of "'probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.'" *Dominion Video Satellite, Inc. v. Echostar Satellite LLC*, 356 F.3d at 1260, *quoting Reuters Ltd. v. United Press Int'l., Inc.*, 903 F.2d 904, 907 (2d Cir.1990).

Plaintiff Intervenors establish convincingly that they meet the standard for issuance of a preliminary injunction. The potential for irreparable harm is substantial, and could never be undone. The hardship to the State pales in comparison. Further, Plaintiff Intervenors have demonstrated a sufficient likelihood of success on the merits to warrant the relief requested. The balance of equities favors Mr. Matthews and Mr. Duty.

B. Use of Pentobarbital Is a Patent Violation of Oklahoma's Death Penalty Statute.

As this Court is aware, the statutorily mandated manner of execution in Oklahoma is lethal injection. *See* Okla. Stat. tit.22 §1014(A). Under the statute "[t]he punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a paralytic agent until death is pronounced by a licensed physician according to accepted medical practice." Okla. Stat. tit.22 §1014(A).

The Oklahoma Department of Corrections has chosen to use sodium thiopental as the ultra short-acting barbiturate. However, DOC does not have any sodium thiopental for upcoming executions.

Counsel for Plaintiff Intervenors currently understand that the State's intention is to execute Mr. Duty and potentially Mr. Matthews using pentobarbital as the all-important anesthetic in the 3-drug lethal injection cocktail. Pentobarbital, however, patently does not comply with Oklahoma's death penalty statute. The statute calls for an "ultra-short acting barbiturate." Pentobarbital, plainly and simply, is not an ultra-short acting barbiturate. The State's own expert has acknowledged this in his expert report.

Criminal statutes, of course, are subject to strict construction. In interpreting any statute, courts are to begin with the plain language of the statute itself. *Lewis v. United States*, 445 U.S. 55 (1980). If the terms of the statute are unambiguous, our inquiry ends. *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987).

It should be axiomatic that, of all scenarios, the imposition of death requires statutory construction of the strictest kind. *See*, *e.g.*, *State of Connecticut v. Courchesne*, 998 A.2d 1, 142 (Conn. 2010) (statutory construction implicating the death penalty must be based on conclusion the legislature has clearly and unambiguously made its intention known; rules of strict construction and lenity applicable to penal statutes generally are especially pertinent to a death penalty statute). In *Courchesne*, quoting from W. Lafave, the Supreme Court of

Connecticut aptly stated:

> No doubt some criminal statutes deserve a stricter construction than others. Other things being equal, felony statutes should be construed more strictly than misdemeanor statutes; those with severe punishments more than those with lighter penalties; those involving morally bad conduct more than those involving conduct not so bad; those involving conduct with drastic public consequences more than those whose consequences to the public are less terrible; those carelessly drafted more than those done carefully.

1 W. LaFave, Substantive Criminal Law (2d Ed. 2003) § 2.2(d), p. 126. *Courchesne*, 998 A.2d at 142. Just as in *Courchesne*, the case *sub judice* "presents most, if not all, of the foregoing hallmarks counseling stricter construction in favor of the defendant." *Id*. The State's intent to use pentobarbital, an intermediate acting barbiturate, simply does not survive construction, strict or otherwise, of Oklahoma's execution statute.

The defendants in this case are not above the law. The use of pentobarbital violates the plain terms of the criminal penalty - in this case the penalty of death. What the State intended to say under the statute is of no import. It is a matter of strict construction. If the State wants to continue killing human beings, it must follow the law in doing so. If the State cannot follow the existing law, then to continue state-sanctioned killing they will have to change the death penalty statute - it is that simple.

The failure to use a ultrashort-acting barbiturate in the execution process if a deprivation of Due Process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. *Hicks v. Oklahoma*, 447 U.S. 343, 345-47 (1980). In *Hicks*, Hicks sought to have his sentence set aside because the sentencing statute under which he was sentenced was found to be unconstitutional by the Oklahoma Court of Criminal Appeals ("OCCA"). *Id.* The OCCA acknowledged that the statute under which Hicks was sentenced was unconstitutional; yet, the court found no error since Hicks' sentence was still within the range of punishment he could have received. *Id.* In vacating and remanding the OCCA's decision the United States Supreme Court found:

> In this case Oklahoma denied the petitioner the...sentence to which we was entitled under state law, simply on the frail conjecture that ... [the] imposed [] sentence [was] equally as harsh as that mandated.... Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

Id. at 346.

Similarly, DOC seeks to deprive Intervenor Plaintiffs Matthews and Duty of their right to be executed through use of an ultra short-acting barbiturate. Okla. Stat. tit.22 §1014(A). Under the current protocols, dated October 21, 2010, DOC intends to use pentobarbital if it cannot obtain sodium thiopental. As noted, pentobarbital does not meet Oklahoma's requirement of an **ultra short-acting barbiturate**. *See* Okla. Stat. tit.22 §1014(A). As such, the use of *pentobarbital* deprives Intervenor Plaintiffs Matthews and Duty of their statutory right to be executed through a lethal quantity of an ultra short-acting barbiturate and this Court should prevent DOC from using it. *See Hicks*, 466 U.S. at 346; Okla. Stat. tit.22 §1014(A).

V. CONCLUSION

For the reasons stated above, equity favors preserving the status quo and allowing this litigation to proceed to a full hearing on the merits. Counsel for Plaintiff Intervenors respectfully request this Court enter preliminary injunctive relief restraining the Defendants from proceeding with any executions using pentobarbital as the anesthetic agent as part of a 3-drug protocol until this litigation can be resolved.

Respectfully submitted,

s/ Timothy R. Payne
TIMOTHY R. PAYNE
T. KENNETH LEE
RANDY A. BAUMAN
ASSISTANT FEDERAL PUBLIC DEFENDERS
OFFICE OF THE FEDERAL PUBLIC DEFENDER
215 Dean A. McGee, Suite 109
Oklahoma City, Oklahoma 73102
Telephone: 405-609-5930
Facsimile: 405-609-5932
E-Mail: tim_payne@fd.org

COUNSEL FOR INTERVENOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 2010, I transmitted the attached document to all ECF registrants and to the following by United States certified mail, return receipt requested and delivery restricted: Stephen Krise, Oklahoma Attorney General's Office; Martha Kulmacz, Oklahoma Attorney General's Office, attorneys for Defendants.

s/ Timothy R. Payne
Timothy R. Payne
Counsel For Intervenor Plaintiff Matthews